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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 492

WALTER W. FLORA, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals (R. 14–18) is reported at 246 F. 2d 929. The memorandum of the District Court (R. 6–9) is reported at 142 F. Supp. 602.

JURISDICTION

The judgment of the Court of Appeals was entered on July 1, 1957. (R. 18.) The petition for a writ of certiorari was filed on September 23, 1957, and was granted on November 25, 1957. (R. 19.) The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

has not paid his entire income tax for the taxable year involved.

STATUTES INVOLVED

28 U. S. C.:

SEC. 1346. *United States as defendant.*

(a) The district courts shall have original jurisdiction, concurrent with the Court of Claims, of:

(1) [as amended by Sec. 1, Act of July 30, 1954, c. 648, 68 Stat. 589] Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws; * * *

* * * * * *

Internal Revenue Code of 1954:

SEC. 7422. CIVIL ACTIONS FOR REFUND.

(a) *No Suit Prior to Filing Claim for Refund.*—No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary or his delegate, * * *.

* * * * * *

(26 U. S. C., 1952 ed., Supp. II, Sec. 7422 (a).)

STATEMENT

The relevant facts are not in dispute. During the year 1950, the taxpayer engaged in transactions involving the purchase and sale of commodity futures and commodities, suffering a net loss of $85,216.10. (R. 40, 41.) This was reported as an ordinary loss. This was disallowed by the Internal Revenue Service, resulting in an addition to the income of taxpayer of $42,608.05, and an assessment of additional tax, plus interest, of $28,908.60. A later assessment was made of a penalty of $45, plus interest. Taxpayer paid a total of $5,058.54 on these assessments, and filed a claim for refund. Upon its disallowance, this suit followed. (R. 20–21.) The United States counterclaimed for the balance of the deficiency. (R. 9–10.)

The United States filed a motion to dismiss on the ground that jurisdiction was lacking since taxpayer had not paid the entire amount of income taxes for 1950. (R. 7.) On February 27, 1956, the District Court ordered that the motion to dismiss be overruled. (R. 11.) In its opinion of July 24, 1956, the District Court reviewed this question (R. 13–15) and stated that the taxpayer "should not maintain the instant suit" (R. 15). However, in view of a conflict between the Third and Eighth Circuits, and since the Court of Appeals for the Tenth Circuit had not passed on the question, the court considered the merits of the case. On the merits, it decided that the losses sustained were capital losses and entered judgment against taxpayer and in favor of

the United States on its counterclaim. (R. 21–22.)

On appeal, the Court of Appeals did not reach the merits, but decided that since taxpayer's complaint affirmatively showed that only a partial payment on the deficiency assessment had been made, the District Court was without jurisdiction. It remanded the case to the District Court with directions to vacate the judgment for the United States on its counterclaim and to dismiss the action without prejudice. (Pet. 18.)

DISCUSSION

As taxpayer points out (Pet. 5), the decision below is in direct conflict with the decision of the Court of Appeals for the Eighth Circuit in *Bushmiaer* v. *United States*, 230 F. 2d 146. It may also possibly be considered to be in conflict with *Coates* v. *United States*, 111 F. 2d 609 (C. A. 2d), and *Sirian Lamp Co.* v. *Manning*, 123 F. 2d 776 (C. A. 3d), although we believe the latter two distinguishable, particularly in view of *Suhr* v. *United States*, 18 F. 2d 81, 83 (C. A. 3d), and the comments in *Bendheim* v. *Commissioner*, 214 F. 2d 26 (C. A. 2d).

While we believe that the decision below is correct and in accord with the views previously expressed by this Court, we do not oppose the granting of the writ of certiorari in view of the direct conflict between the Eighth and Tenth Circuits.

The question, one solely of law, is one of continuing importance in the administration of the internal revenue laws, under the Internal Revenue Code of 1954 as well as its predecessors, and may be

expected to recur until authoritatively settled by this Court.

CONCLUSION

For the reasons stated, the Government does not oppose the granting of certiorari.

Respectfully submitted,

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OCTOBER 1957.

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